was burdened, until the mortgage would have been barred as against the mortgagor.[23] Further, it prevents the mortgagee's uncertainty which necessarily results from his duty under the former rule to search the records for a conveyance of the mortgaged property, for under such a rule his rights to foreclose may depend altogether on the constructive notice afforded by recording.[24]

The situation in New York is peculiar. The Court of Appeals has asserted the second rule in at least three decisions;[25] where the point, however, was not squarely in issue. The Appellate Division, meanwhile, has evinced a pronounced tendency towards the other view.[26] It is probable, however, that the Court of Appeals will follow the sounder legal principle, rather than the arguments of expediency advanced, and consequently sustain the view heretofore expressed.

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DEFENSE OF PROPERTY BY MECHANICAL APPLIANCES.—The common law right to resort to violence in defense of property is limited by the principle that the force used must not outrun the provocation.[1] A threatened trespass on land may be resisted with commensurate force,[2] but not to the taking of life.[3] Accordingly the protection of land by deadly appliances, such as spring-guns, is not permissible.[4] The right to use extreme violence in defending the dwelling is more doubtful. The householder may kill an invader if killing is apparently necessary to avert a felony of violence.[5] Whether killing is permissible solely to prevent a felonious taking of property, depends on the theory adopted to explain the owner's right. On one theory, he is entitled to kill in order to protect property as such,[6] and he may shoot down a burglar because his goods would otherwise be stolen. On the other, he may kill only to avert a crime of violence which may endanger human life. In defending his goods against a burglar by a less violent mode, as he may lawfully do, he incurs great personal risk; this peril justifies him in taking the burglar's life to save his own. Hence the law does not compel him to undergo this peril, but allows him to kill instanter.[7] This doctrine is submitted as that of the common law, and seemingly explains the distinction made by writers between felonies attended with

[23]Kerndt Bros. *v.* Porterfield (1881) 56 Ia. 412; Clinton Co. *v.* Cox (1873) 37 Ia. 570.

[24]See cases under 11 *supra.*

[25]N. Y. Life Ins. etc. Co. *v.* Covert (N. Y. 1819) 6 Abb. Pr. Rep. (N. S.) 154; Murdock *v.* Waterman (1895) 145 N. Y. 55; Mark *v.* Anderson (1900) 165 N. Y. 529.

[26]Fowler *v.* Wood (N. Y. 1894) 78 Hun 304; Simonson *v.* Nafis (N. Y. 1899) 36 App. Div. 473.

[1]Pollock, Torts (5th ed.) 165.

[2]Weaver *v.* Bush (1798) 8 T. R. 78.

[3]State *v.* Vance (1864) 17 Ia. 138.

[4]Bird *v.* Holbrook (1828) 4 Bing. 628; Hooker *v.* Miller (1873) 37 Ia. 613; 7 & 8 Geo. IV. c. 18. In Ilott *v.* Wilkes (1820) 3 B. & Ald. 304, redress was denied on the ground that the plaintiff, having notice of the condition of the defendant's premises, had by trespassing assumed the risk of injury.

[5]State *v.* Patterson (1872) 45 Vt. 308; Thompson *v.* State (1901) 61 Neb. 210. Many courts adopt in substance Foster's definition of justifiable self-defense, that one may repel force by force, to the taking of life if need be, in defense of person, habitation or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony on either; Foster, Crown Law 273; Pond *v.* People (1860) 8 Mich. 150; and this definition has been substantially embodied in several State codes. People *v.* Flanagan (1881) 60 Cal. 2; McPherson *v.* State (1857) 22 Ga. 478.

[6]Lilley *v.* State (1885) 20 Tex. App. 1.

[7]See People *v.* Payne (1857) 8 Cal. 341.

violence and surprise, and those not so attended; the former involve of necessity a danger to human life which the latter do not. Therefore an attempt by night to break and rob an unoccupied building in the curtilage justifies the owner in killing the felon;[8] while an attempt to pick a pocket does not.[9] If, however, an owner may assume that one entering as a burglar will kill if resisted, he is entitled on either doctrine to shoot down the intruder. Hence the right to kill in necessary defense of property from a violent felony is ordinarily a working test of the householder's liability.

The adoption of a spring-gun to safeguard the dwelling by night should not enlarge the owner's right of defense. The owner if present could shoot down only such an intruder as he had reasonable cause to consider a desperate criminal;[10] if his spring-gun causes death, he must show in defense at least that the person killed was one whom he might lawfully have killed if present. It may well be argued, however, that the liability for injury or death from deadly appliances is absolute.[11] If, as maintained above, the right to kill in defense of property exists only against a felony involving danger to life, deadly appliances are unavailable to protect an empty house,[12] and, *a fortiori,* a bank or warehouse. In such cases, therefore, the owner would seem to be limited to non-deadly appliances. In the absence of knowledge[13] or contributory negligence[14] by the invader, an action of tort would lie wherever the owner is criminally liable.[15]

In a recent Alabama case, *Scheuermann* v. *Scharfenberg* (Ala. 1909) 50 So. 335, the owner of a storehouse containing valuable goods placed a spring-gun therein to protect it from burglars. The plaintiff, while breaking in to rob the premises, discharged the gun and was badly wounded. In trespass, the court held the owner not liable, declaring that, as burglary of a storehouse and of a dwelling had been made by statute felonies of the same degree, a storehouse might be regarded as a dwelling for purposes of protection. The decision follows *Gray* v. *Combs,*[16] which is possibly distinguishable on the ground that the deceased was a slave and therefore property. The principal case cannot be reconciled with the theory advanced above as to the basis of the right to kill in defense of the dwelling from a felonious invasion; for by that theory, the presence of some human being to be endangered is essential to the existence of that right. However, respectable authority exists for the view that the right to protect property by killing was earlier and more fully recognized at common law than the right to kill in self-defense.[17] Upon this theory a thief may be killed solely to prevent a felonious taking, a view adopted by some jurisdictions;[18] and accordingly the use of spring-guns to protect property in dwellings, occupied or unoccupied, or in storehouses, is permissible. Although there are exceptional cases where the civil and criminal liability

[8]Parrish *v.* Comw. (1885) 81 Va. 1.
[9]1 Russell, Crimes 875-6.
[10]State *v.* Harris (N. C. 1853) 1 Jones' Law 190.
[11]*Cf.* State *v.* Barr (1895) 11 Wash. 481.
[12]State *v.* Barr *supra.*
[13]Ilott *v.* Wilkes *supra.*
[14]Magar *v.* Hammond (1902) 171 N. Y. 377.
[15]See Kline *v.* Kline (1902) 158 Ind. 602.
[16](Ky. 1832) 23 Am. Dec. 431.
[17]Beale, Retreat from a Murderous Assault, 16 Harv. L. Rev. 567.
[18]Lilley *v.* State *supra;* Crawford *v.* State (1892) 90 Ga. 701.

would not be co-extensive,[19] it is conceived that the civil liability would not outrun the criminal on the facts of the principal case; the view taken by the court.

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THE RIGHT TO DISBAR AN ATTORNEY FOR MISCONDUCT TOWARD THE COURT.—Since an attorney's right to practice is a mere license,[1] the right to disbar of course exists as a necessary incident in any court having the power to license,[2] although by the weight of authority this right of abrogation is inherent in any court of record.[3]

The nature of the attorney's misconduct toward the court which will warrant disbarment, it is submitted, can always be classified under one or more of the following tests. (1) The subjective test in respect to the attorney: any act which establishes his moral delinquency in a professional capacity, as inciting his clients to bring newspaper pressure to bear on the judges;[4] or even in his private capacity, if the act be of a sufficiently criminal nature, such as encouraging a felony.[5] (2) The subjective tests as to the courts: (a) any conduct which tends to destroy their impartiality in rendering a decision in a pending cause, if intended to effect such a result,[6] such as writing a letter to the judge accusing him of having withheld, because of corporate influence, a decision previously written in favor of the attorney's client,[7] or (b) any conduct which shows lack of due respect for the court,[8] such as personally accusing a judge of malfeasance in a judicial capacity,[9] the intent being presumed from the act.[10] (3) The objective tests in respect to both the court and the attorney: any conduct tending to impair popular confidence in the courts,[11] such as publicly charging a conspiracy between the judge and the opposing counsel, where again actual intent is immaterial.[12] Although these tests are constantly intermingled and sometimes confused by the courts, it is conceived that they are distinct.

In the recent case of *In re Thatcher* (Ohio 1909) 89 N. E. 39, an attorney, in a libellous pamphlet criticized the past decisions and impugned the integrity of a judge who was a candidate for re-election, and the court considered that the attorney's conduct evinced moral turpitude and lack of due respect sufficient to justify disbarment. Although the result reached cannot be attacked, since the degree of conduct warranting disbarment rests so largely in the discretion of the court,[13] the case raises the salient

[19]Insanity, for example, may relieve the defendant of criminal though not of tort liability.

[1]Bradwell *v.* State (1872) 16 Wall. 130.
[2]*In re* Murray (1890) 11 N. Y. Supp. 336.
[3]*In re* Simpson (1900) 9 N. D. 379.
[4]*Ex parte* Cole (Ia. 1879) 1 McCrary 405, 408.
[5]*Ex parte* Wall (1882) 107 U. S. 265.
[6]Case of Austin (Pa. 1835) 5 Rawle 191.
[7]Smith's Appeal (1897) 179 Pa. St. 14.
[8]Bradley *v.* Fisher (1871) 13 Wall. 335.
[9]Johnson *v.* State (1907) 152 Ala. 93.
[10]People *v.* Green (1887) 7 Col. 237, 241.
[11]*In re* Mains (1899) 121 Mich. 603.
[12]*In re* Snow (1904) 27 Utah 266.
[13]Scouten's Appeal (1898) 186 Pa. St. 270.